**KLAXXIE CORP. (M) SDN. BHD.**

**v.**

**NG AI GEOK & ANOR.**

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[APPLICATION FOR EXECUTION NO. 217 OF 1984]
4 AUGUST 1986

***CIVIL PROCEDURE:*** *Application by defendants to set aside judgment in default of appearance and writ of seizure and sale - Stay of execution in respect of default judgment - Order sought by defendants that plaintiff pay damages to 2nd defendant for wrongful execution and costs - Whether judgment regular - Defence on the merits.*

This was an application by the defendants to set aside judgment in default of appearance entered against them on 5 March 1984. The defendants also asked the Court to set aside the writ of seizure and sale issued against them on 28 June 1984. The defendants further asked for a stay of execution in respect of the judgment entered in default of appearance. Finally, the defendants asked for an order that the plaintiff pay damages to the 2nd defendant for wrongful execution and costs.

The defendants contended that the judgment of default of appearance entered against them was never served on them.

**Held:**

**[1]** Having heard the evidence of all the witnesses, the Court was of the opinion that there was a strong possibility that the writ was served on both the defendants on 16 February 1984. Since the writ was served on the defendants, the judgment in default of appearance against the defendants was a regular judgment.

**[2]** Since the judgment was regular, the next question for the Court to consider was whether the defendants had filed an affidavit of merits to show that they had a *prima facie* defence.

**[3]** The defendants, in their affidavits, had shown a defence on the merits. In other words, the defence had disclosed arguable and triable issues.

*[Default judgment set aside. Defendants given 14 days from date of judgment to file their defence.]*

**Cases referred to:**
*Evans v. Bartlam [1937] AC 473*
*Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Raayat [1979] 1 MLJ 23*

*For the defendants/applicants - Ambiavagar; M/s. Fernandez & Co.*
*For the plaintiff/respondent - Harcharan Singh; M/s. Manjit Singh Sachdev & Co.*

**JUDGMENT**

**Zakaria Yatim J:**

This is an application by the defendants to set aside judgment in default of appearance entered against them on 5 March 1984. The defendants also ask the Court to set aside the writ of seizure and sale issued against them on 28 June 1984. The defendants further ask for

a stay of execution in respect of the judgment entered in default of appearance. Finally, the defendants ask for an order that the plaintiff pay damages to the second defendant for wrongful execution and costs.

It should be mentioned here that when the defendants filed the notice of motion, they did not include a prayer to set aside judgment in default. In the course of the hearing of the motion, Miss Ambiavagar, Counsel for the defendants made an oral application to amend the notice of motion by including a prayer to set aside judgment in default of appearance. Mr. Harcharan Singh, Counsel for the plaintiff told the Court that he had no objection to the application. I allowed the application and included the prayer to set aside judgment in default of appearance in the notice of motion.

The plaintiff's claim against the defendants was for a sum of RM57,330.46 being the outstanding amount due to the plaintiff for goods supplied to the first defendant. By a written agreement dated 30 April 1982 made between the plaintiff and the two defendants, the first defendant was appointed as a stockist of the plaintiff's products. By cl. 16 of the same agreement, the second defendant undertook to reimburse the plaintiff against all loss and damage suffered by the plaintiff in the event of the failure of the first defendant to observe, perform or comply with the terms and conditions of the said agreement. Pursuant to the said agreement, the plaintiff supplied to the first defendant goods bearing the plaintiff's brand name for the purpose of selling the same to dealers or representatives authorised by the plaintiff at predetermined prices. By an agreement dated 29 March 1983, the defendants agreed to discharge fully all monies owing to the plaintiff through a cheque amounting to RM24,706.76 made payable to the plaintiff. The cheque was duly presented for payment but was dishonoured and returned to the plaintiff. According to the plaintiff, the total sum owed by the defendants was RM57,330.46.

The defendants contended that the judgment in default of appearance entered against them was not a regular judgment in that the writ was not served on them. The affidavits affirmed on behalf of the plaintiff stated that the writ was served on the defendants whilst the defendants' affidavits averred that the writ was never served on them. Counsel for both parties agreed that the deponents of the affidavits be cross-examined in respect of the question of the service of the writ to enable the Court to determine whether or not the writ was duly served on the defendants.

The witnesses who were cross-examined were Cheng Fun Lin, the managing director of the plaintiff company; Jit Singh, the assistant store manager of the plaintiff company; the first defendant, the second defendant and two other witnesses for the defence, Leong Chak Yin and Tok Bok Yung.

Mr. Cheng Fun Lin in his evidence in Court said that on 16 February 1984 he went to a house at No. 27A, Jalan Tapah, Kelang and met both the defendants. He handed them two copies of the writ and requested them to put their signatures at the back of the writ. According to him the defendants refused to do so but they accepted the writs.

Jit Singh testified that he went to the said premises with Mr. Cheng and saw the two defendants there. He said he was present when Mr. Cheng served the writ on the defendants.

The first defendant told the Court that on 16 February 1984 she was at her sister's place. She said that she was expecting a baby and during her confinement she stayed at her sister's place. She denied that she was at No.27A, Jalan Tapah on 16 February 1984.

The second defendant, in cross-examination said that on 16 February 1984 he was at the coffee shop where he was working. On that day he was at the coffee shop from 7.00 a.m. to 6.00 p.m. He denied that he was served with a writ on that day.

Mr. Leong Chak Yin, in his evidence in Court, said that he was doing his business at the house at 27A, Jalan Tapah. He said that the first defendant did not occupy two rooms at the said premises. He denied that Mr. Cheng served any writ on the premises.

Mr. Tok Bok Yung was a noodle seller at the coffee shop of the second defendant. He worked at the shop from 6.00 a.m. to 7.00 p.m. He told the Court that on 16 February 1984, the second defendant did not leave the coffee shop.

Having heard the evidence of all the witnesses and having watched their demeanours, I come to the conclusion that Mr. Cheng Fun Lin is a truthful witness. His evidence was corroborated by Jit Singh. Mr. Cheng's evidence is also consistent with his affidavits affirmed on 5 March 1984, 19 July 1984 and 20 August 1984 respectively. The first defendant claimed that she had an alibi: she was at her sister's place all the time. In her affidavits affirmed on 5 July 1984 and on 20 July 1984, she gave her address as No. 15, Jalan Kakak Tua, Ladang Eng Aun, Kelang. In her evidence in Court she gave address as 241, Jalan Kapar, Kelang. With regard to the second defendant, he seemed to remember clearly what happened on 16 February 1984. But he did not know the date of birth of his child and neither did he know the date of the Chinese New Year. Mr Leong Chak Yin admitted in Court that his company and the plaintiff were competitors in business.

In my opinion, there is a strong probability that the writ was served on both the defendants on 16 February 1984. Since the writ was served on the defendants, the judgment in default of appearance against the defendants is a regular judgment.

Since the judgment is regular, the next question for the Court to consider is whether the defendants have filed an affidavit of merits to show that they have a *prima facie* defence. See *Evans v. Bartlam* [1937] AC 473. See also *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Raayat* [1979] 1 MLJ 23 at 24.

In his affidavit affirmed on 5 July 1984 in support of the application, the second defendant averred that the plaintiff's action against the defendants was in respect of accounts rendered which left a credit in favour of the plaintiff in the sum of RM24,706.76 as at 31 March 1983. According to him by an agreement dated 29 March 1983 the plaintiff received from the second defendant by way of security a cheque No.550728 for a sum of RM24,706.76. This agreement was mentioned in paragraph 6 of the statement of claim and according to the plaintiff the cheque was subsequently dishonoured. The second defendant, in the same affidavit, said that he also paid a sum of RM13,400.37 to the plaintiff leaving a balance of RM11,306.39. He exhibited the receipts issued by the plaintiff in respect of the sum of RM13,400.37 paid by him to the plaintiff. The receipts were dated in June and July 1983, that is, after the agreement dated 29 March 1983 was concluded. The receipts show that the plaintiff had received payment in the sum of RM13,400.37 from the defendants. In his subsequent affidavit affirmed on 20 July 1984, the second defendant disputed that he owed the plaintiff more than RM24,706.76. He mentioned that the amount owed by him to the plaintiff was as stated in the agreement dated 29 March 1983. In his earlier affidavit, the second defendant also pleaded a set-off. According to him the plaintiff owed the first defendant trade discount and charges pertaining to the agency account between the plaintiff and the first defendant since January 1983 which amounted to RM15,000. He stated that the sum of RM11,306.39 ought to be set-off against any sum due from the plaintiff to the first defendant.

In my judgment the defendants, in their affidavits, have shown a defence on the merits. In other words, the defence has disclosed arguable and triable issues.

In the circumstances, I set aside the judgment in default of appearance. The defendants are given fourteen days from the date of this judgment to file their defence. The defendants will bear all costs thrown away by the plaintiff in any event.

Also found at [1986] 2 CLJ 248